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22850	7590	10/03/2008	EXAMINER	
OBLON, SPIVAK, MCCLELLAND MAIER & NEUSTADT, P.C. 1940 DUKE STREET ALEXANDRIA, VA 22314			PRICE, CARL D	
			ART UNIT	PAPER NUMBER
			3749	
			NOTIFICATION DATE	DELIVERY MODE
			10/03/2008	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b> 10/759,508	<b>Applicant(s)</b> DECKER, DAYNA M.	
	<b>Examiner</b> Carl D. Price	<b>Art Unit</b> 3749	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 09/08/2008 RCE.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) See Continuation Sheet is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) 241-262 is/are allowed.
- 6) ☒ Claim(s) 158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219 and 264 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

Continuation of Disposition of Claims: Claims pending in the application are 158-160,162-165,167,168,170,171,173-180,182-185,187,189,190,193-202,204,205,209-211,214-219,241-262 and 264.

## DETAILED ACTION

### Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on **09/08/2008** has been entered.

### Response to Arguments

Applicant's arguments with respect to claims **158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219, 241-262** and **264** have been considered but are moot in view of the new ground(s) of rejection.

Claims **1-157, 161, 166, 169, 172, 181, 186, 188, 191-192, 203, 206, 208, 212-213, 220-240, and 263** have been cancelled.

Claims **158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219, 241-262** and **264** are pending.

Claim **241-262** have previously been indicated to be allowable over the prior art of record.

Applicant has amended the claims to be of a scope not previously considered. Consistent with applicant's argument that the prior art relied on in the previous office action fail to show, disclose and/or teach certain aspects of applicant's invention now recited in the claims filed on **07/17/2007**, applicant has amended the claims to include at least the following:

#### **Claim 159 (Currently Amended):**

A candle or candle apparatus, comprising:  
a body of a meltable fuel; and  
a rigid, planar wick provided in the body, ~~the wick comprising a wood selected from the group consisting of poplar, cherry, maple, wenge, oak, rosewood and bamboo;~~  
wherein:

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the wick has a height dimension, a width dimension, and a thickness dimension;  
the height dimension is greater than the width dimension;  
the width dimension is greater than the thickness dimension; and  
**the wick provides an acoustic crackling sound when burned the wick comprises a wood selected from the group consisting of poplar and cherry.**

**Claim 179 (Currently Amended):**

A candle or candle apparatus, comprising:  
a body of a meltable fuel; and  
a rigid, planar wick provided in the body, the wick comprising a wood having a moisture content of from 10 to 12 percent;  
wherein:  
the wick has a height dimension, a width dimension, and a thickness dimension;  
the height dimension is greater than the width dimension;  
the width dimension is greater than the thickness dimension; **and**  
**~~the wick provides an acoustic crackling sound when burned~~** the wick comprises a wood having substantially straight grains aligned substantially in the height dimension;  
and the wood has a moisture content of from 6 to 8 percent.

**Claim 264 (New):**

A candle or candle apparatus, comprising:  
a body of a meltable fuel; and  
a rigid, planar wick provided in the body;  
wherein:  
the wick has a height dimension, a width dimension, and a thickness dimension;  
the height dimension is greater than the width dimension;  
the width dimension is greater than the thickness dimension; and  
the wick comprises a wood selected from the group consisting of poplar and cherry;  
the wood has substantially straight grains aligned substantially in the height dimension;  
the wood has a moisture content of from 6 to 8 percent ; and  
the thickness dimension of the wick is from 0.023 to 0.028 inches.

Applicant submits a Declaration Under 37 C.F.R. § 1.132 attempting to rebut the examiner's position that the various materials and parameters recited in claims, and selected values recited in the claims from among those parameters, constitutes a mere design choice. However, the Declaration under **37 CFR 1.132** filed on **09/08/2008** is insufficient to overcome the rejection of claims. See the examiner's comments below.

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While acknowledging that “Ebeling does, indeed, disclose an outdoor candle including a wick made of wooden material impregnated with a combustible material.” applicant goes on to argue that:

“The Office Action does not identify or cite a single reference that discloses a candle wick: (i) made from poplar or cherry; (ii) made from a wood having straight, vertical grains and moisture content of from 6 to 8 percent; or having a thickness of from 0.023 to 0.028 inches.”

In response to applicant's arguments against the references of Ebeling individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). That is, the combination of teachings available at the time of the invention and presented in the prior art references of SE9903818 (Ebeling) (English language translation provided), US006017373 (Frisch) and FIREWOOD FOR YOUR FIREPLACE by Warren Donnelly (herein after referred to as Donnelly) suggest the desirability of audible crackling noises in firewood. The wick of SE9903818 (Ebeling) being made of wood would therefore predictably benefit from a selected amount of moisture added to the burning wooden wick material. at least for the reasons presented in **Donnelly** which taught, at the time of the invention, that it was known to select a given type of wood for the purpose of intentionally creating a “crackling fire” (see page 18, line 5) when burned, according to the preference of the person to, for example, create a “cheerful atmosphere, to attract friends for a cozy evening” (page 17, last line). And, for the reasons and by the means taught by **Donnelly**. Namely, that “**Almost any wood will pop and throw sparks**” due to rupturing of wood cells resulting from “**water in the wood being changed to steam as the wood is heated**” and “from pitch, resin, and oils contained in the wood” (page 34, line 3- page 35, line 3). Indeed, according to **Donnelly's** acknowledgment that the degree a given wood species produces “sparks”, necessarily accompanied by a “loud pop” as wood cells rupture, is known (page 85, last full paragraph). And, noting that **Donnelly** provides a “Table of Firewood” wherein “The different burning characteristics of each wood are listed so you should make your selection according to the type of fire you desire: ease of starting, high heat, fragrance, sparks, smoke, coaling qualities, etc.” (pages 88-95). The examiner therefore maintains that for at least

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the purpose of duplicating the ascetically pleasing audible snapping or popping sound of a natural wood fire, to create a "cheerful atmosphere", it would have been obvious to a person having ordinary skill in the art to form the wood wick material of **SE9903818 (Ebeling)** from a wood product having characteristics known to produce a desired level of, for example, audible crackling, snapping or popping sounds such as due to a desired level of moisture therein (e.g. – from water, pitch, resin, oils, etc.), in view of the teaching of **US006017373 (Frisch)** and **Donnelly**. As long as some motivation or suggestion to combine the references is provided by the prior art taken as a whole, the law does not require that the references be combined for the reasons contemplated by the inventor. See *In re Beattie*, 974 F.2d 1309, 24 USPQ2d 1040 (Fed. Cir. 1992); *In re Kronig*, 539 F.2d 1300, 190 USPQ 425 (CCPA 1976) and *In re Wilder*, 429 F.2d 447, 166 USPQ 545 (CCPA 1970). Applicant claims a combination that only unites old elements with no change in the respective functions of those old elements, and the combination of those elements yields predictable results; absent evidence that the modifications necessary to effect the combination of elements is uniquely challenging or difficult for one of ordinary skill in the art, the claim is unpatentable as obvious under 35 U.S.C. 103(a). *Ex Parte Smith*, 83 USPQ.2d at 1518-19 (BPAI, 2007) (citing *KSR*, 127 S.Ct. at 1740, 82 USPQ2d at 1396. Accordingly, since the applicant[s] have submitted no persuasive evidence that the combination of the above elements is uniquely challenging or difficult for one of ordinary skill in the art, the claim is unpatentable as obvious under 35 U.S.C. 103(a) because it is no more than the predictable use of prior art elements according to their established functions resulting in the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for improvement.

The examiner again acknowledges that under some circumstances, changes in a particular range of material may impart patentability if the particular ranges claimed produce a new and unexpected result which is different in kind and not merely in degree from the results of the prior art. *In re Dreyfus*, 22 CCPA (Patents) 830, 73 F.2d 931, 24 USPQ 52; *In re Waite et al.*, 35 CCPA (Patents) 1117, 168 F.2d 104, 77 USPQ 586. Such ranges are termed "critical" ranges, and the applicant has the burden of proving such criticality. *In re Swenson et al.*, 30 CCPA (Patents) 809, 132 F.2d 1020, 56 USPQ 372; *In re Scherl*, 33 CCPA (Patents) 1193, 156 F.2d 72,

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70 USPQ 204. However, even though applicant's modification results in great improvement and utility over the prior art, it may still not be patentable if the modification was within the capabilities of one skilled in the art. In re Sola, 22 CCPA (Patents) 1313, 77 F.2d 627, 25 USPQ 433; In re Normann et al., 32 CCPA (Patents) 1248, 150 F.2d 627, 66 USPQ 308; In re Irmscher, 32 CCPA (Patents) 1259, 150 F.2d 705, 66 USPQ 314. More particularly, where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation. In re Swain et al., 33 CCPA (Patents) 1250, 156 F.2d 239, 70 USPQ 412; Minnesota Mining and Mfg. Co. v. Coe, 69 App. D.C. 217, 99 F.2d 986, 38 USPQ 213; Allen et al. v. Coe, 77 App. D.C. 324, 135 F.2d 11, 57 USPQ 136. In this regard the examiner maintains that design parameters such as the relative dimensions of a wooden wick and fuel body, the wick size and dimensions, number and shape of the wick(s), would necessarily depend on numerous interrelated design concerns such as a desired level or volume of audible sound or noise, a desired amount of light to be produced, particular fuel characteristics, a particular a desired overall size and shape of a given candle article, etc. to form the candle of **SE9903818 (Ebeling)** in the manner set forth in the claims can be viewed as nothing more than merely a matter of choice in design absent the showing of any new or unexpected results produced therefrom over the prior art of record.

**Declaration Under 37 C.F.R. § 1.132**

The Declaration under **37 CFR 1.132** filed on **09/08/2008** is insufficient to overcome the rejection of claims 158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219, 241-262 and 264 based upon 35 U.S.C. 103(a) as being unpatentable over **SE9903818 (Ebeling)** (English language translation provided) in view of **US006017373 (Frisch)** and **FIREWOOD FOR YOUR FIREPLACE** by Warren Donnelly (herein after referred to as **Donnelly**), and supported in part by **US000383822 (Munger)**, **US0059839** and **Ladd (US00197902)** as set forth in the last Office action because:

The Declaration under 37 CFR 1.132 is presented by Dayna Decker (herein after referred to as Declarant) who is the sole inventor of the present patent application.



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Beginning in paragraph 4 Declarant presents for review by the examiner TABLES A-P which include information for wicks prepared from various woods having various properties and dimensions. Declarant also indicates that each wick of TABLES A-P as well as a body of meltable fuel including paraffin and 10% fragrance was prepared in a glass jar having a diameter of 3 inches. Declarant states that each wick of TABLES A-P were oriented in a respective glass so that the wick extended 0.125 to 0.375 inches above the top surface of the body of meltable fuel. And, Declarant notes that the resulting candles were observed, while burning for up to 6 hours.

In the last paragraph (paragraph 5), without providing specific evidence or criteria for arriving at the conclusions arrived at Declarant makes only the following statements in support of non-obviousness of the invention over the prior art of record:

“5. As is evident from the observations in TABLES A-P above, candles including wicks formed from poplar or cherry, as in claim 159 of the above-captioned patent application, candles including wicks formed from wood having substantially straight grains aligned substantially in the height dimension and a moisture content of from 6 to 8 percent, as in claim 179, and candles including wicks having thicknesses of from 0.023 to 0.028 inches, as in claim 199, provide unexpected, superior burning properties (Good Flame, Good Crackling Sound) relative to candles including wicks that do not possess such features. These results are objective evidence of the improvements of the candles or candle apparatus of claims 159, 179 and 199 over candles as in SE 9903818 to Ebeling ("Ebeling") (cited in the outstanding Office Action in the above-captioned patent application) and thus these results rebut any suggestion that it would have been obvious to modify the candles of Ebeling in view of the teachings of the other cited references.”

Declarant's conclusions presented in paragraph 5 of the Declaration are not found to be persuasive, since Declarant provides no analysis or specific factual basis for the conclusions rendered. Declarant merely states that “As is evident from the observations in TABLES A-P ...” without pointing to specific and meaningful data and/or observations and without presenting a critical analysis of information and/or observations so as to support Declarant's conclusions. That is, Declarant provides no explanation for supporting such findings.

Declarant's conclusion, presented in paragraph 5, that the information presented in TABLES A-P provide unexpected, superior burning properties (Good Flame, Good Crackling Sound) is not commensurate with the scope of the claimed invention since no claims contain limitations which address flame properties or crackling sounds.

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Although an affidavit or declaration which states only conclusions may have some probative value, such an affidavit or declaration may have little weight when considered in light of all the evidence of record in the application. In re Brandstadter, 484 F.2d 1395, 179 USPQ 286 (CCPA 1973).

With regard to the relevance of the information presented in the Declaration the Declarant outlines that observations are made with regard to the claimed invention:

The observations presented in the Declaration are a result of tests performed on candles having a specific fuel formulation (i.e. - a body of meltable fuel including paraffin and 10% fragrance), a specific candle body container material and wax diameter (i. e. - prepared in a glass jar having a diameter of 3 inches), and a specific orientation of the wick with regard to the glass container and meltable fuel (i. e. - so that the wick extended 0.125 to 0.375 inches above the top surface of the body of meltable fuel).

At least with regard to the particular wax formulation and wax diameter, Delarant's showing is not commensurate in scope with the claims since neither of the closest prior art reference of **SE9903818 (Ebeling)** of the independent claims 159, 179, 199, or 264 require such a formulation and arrangement. Therefore, the examiner is not persuaded by Declarant's suggestion that the observations made under the conditions presented in the Declaration necessarily show unexpected, superior burning properties relative to candles including wicks that do not possess such features. Since, for example, the alleged unexpected, superior burning properties have not been shown to be the result of the combine characteristic of the tested candles having a specific fuel formulation (i.e. - a body of meltable fuel including paraffin and 10% fragrance), a specific candle body container material and wax diameter (i. e. - prepared in a glass jar having a diameter of 3 inches), and a specific orientation of the wick with regard to the glass container and meltable fuel (i. e. - so that the wick extended 0.125 to 0.375 inches above the top surface of the body of meltable fuel). That is, Declarant conclusions are not based on tests comparing appellant's article with that of the closest prior art of **SE9903818 (Ebeling)**. See, for example, In re De Blauwe, 736 F.2d 699, 705, 222 USPQ 191, 196 (Fed. Cir. 1984) ("It is well settled that unexpected results must be established by factual evidence." "[A]ppellants have not presented any experimental data showing that prior heat-shrinkable articles split. Due to the absence of tests comparing appellant's heat shrinkable articles with those of the closest prior art,

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we conclude that appellant's assertions of unexpected results constitute mere argument."'). See also In re Lindner, 457 F.2d 506, 508, 173 USPQ 356, 358 (CCPA 1972); Ex parte George, 21 USPQ2d 1058 (Bd. Pat. App. & Inter. 1991). See, for example, In re De Blauwe, 736 F.2d 699, 705, 222 USPQ 191, 196 (Fed. Cir. 1984) ("It is well settled that unexpected results must be established by factual evidence." "[A]ppellants have not presented any experimental data showing that prior heat-shrinkable articles split. Due to the absence of tests comparing appellant's heat shrinkable articles with those of the closest prior art, we conclude that appellant's assertions of unexpected results constitute mere argument."'). See also In re Lindner, 457 F.2d 506, 508, 173 USPQ 356, 358 (CCPA 1972); Ex parte George, 21 USPQ2d 1058 (Bd. Pat. App. & Inter. 1991).

In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness.

Claims **158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219** and **264** are not patentable for the reasons set forth herein above and for the reasons set forth in the following examiner's action.

#### **Claim Rejections - 35 USC § 103**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

#### **Claims Rejected under 35 U.S.C. 103(a)**

Claims **158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219** and **264** are rejected under 35 U.S.C. 103(a) as being unpatentable over **SE9903818 (Ebeling)** (English language translation provided) in view of **US006017373 (Frisch)** and **FIREWOOD FOR YOUR FIREPLACE** by Warren Donnelly (herein after

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referred to as **Donnelly**), and supported in part by **US000383822 (Munger)**), **US0059839** and **Ladd (US00197902)**.

**SE9903818 (Ebeling)** shows and discloses (see the attached English language translation) a candle including:

- a body of meltable fuel; and
- a thin flat (figure 1) elongate wood or wood product wick (see the attached English language translation) disposed in the body and having an upper end extending above an upper surface of the body; and the body of the meltable fuel further comprises a gum or a resin, whereby when the wick is burned and consumes the meltable fuel;
- the upper end of the wick protruding from the candle substance; and
- the glue (10) receiving the thin flat wick forms, when solidified, a wick holder in a base of the body, the wick holder having an elongate slot in which a lower end of the wick is received.

The English language translation of the **SE9903818 (Ebeling)** discloses the following:

**“State of the art**

Outdoor candles of the conventional art are made, on the one hand, of some form of combustible candle substance that can be molded: for example, a candle material consisting of paraffin, stearin, and/or tallow; ...”

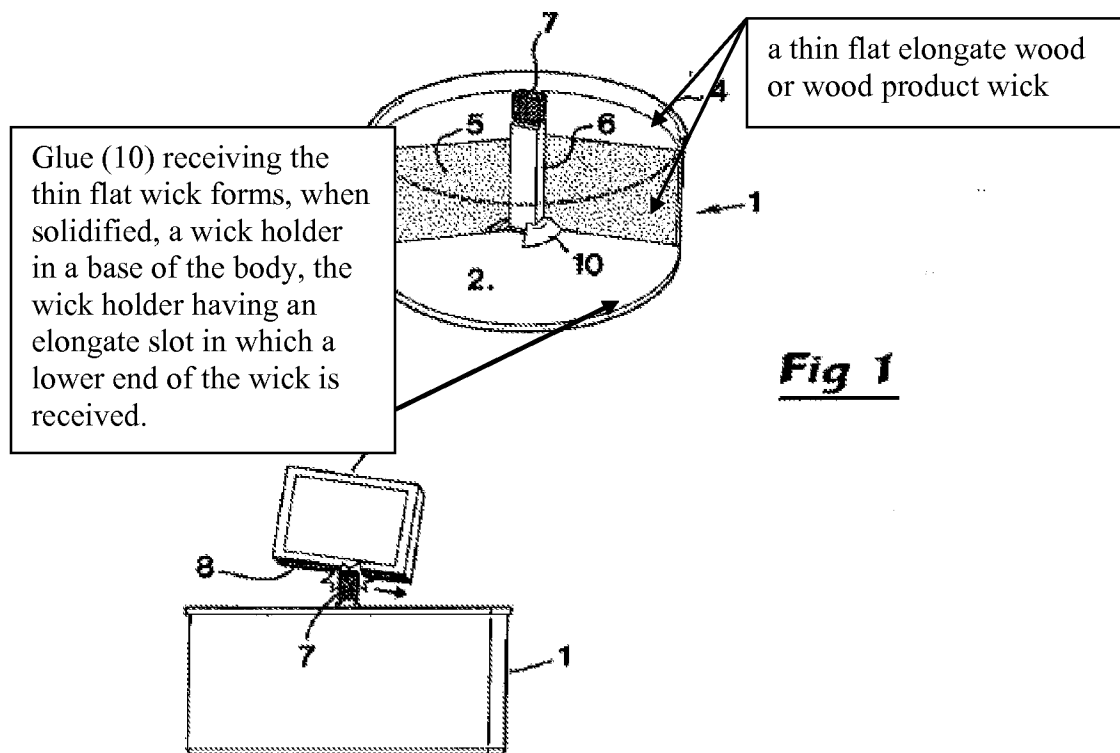
**“Detailed Description of a preferred embodiment of the invention**

In the drawing, Figure 1 shows a general view of cup or tin, which, in the usual manner, is comprised of a flat bottom 2 and a continuous cylindrical wall 3, which is open at the top, above its upper rim 4. A candle substance or other combustible substance 5 of a suitable composition has been poured into the cup. In the center of this substance 5, a wick 6 is anchored -- in accordance with present invention -- with the upper end of the wick protruding from the candle substance, and which has a head that can be ignited by scraping something against it 7. This ignitable head can be made of various materials (for example sulfur), which have the common characteristic that they can be ignited when an igniting body is scraped against the ignitable head. Figure 2 illustrates how a striking surface 8 of a conventional matchbox 9 can be used to light the ignitable head of the wick. ...

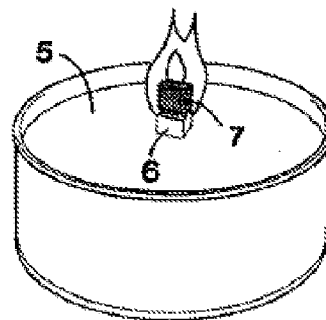
The actual wick 6 can advantageously be made of a material that retains its shape, for example some kind of wooden material, which is impregnated with a combustible material, after which the ignitable head 7 is applied to the top of the wick. The outdoor candle is made in the conventional way with the wick being placed in the center of the bottom of the cup 2 and fixed in that position, for example, by using a daub of glue 10 ...”

(Highlighting and Underlining Added)

**SE9903818 (Ebeling)** shows and discloses the invention substantially as set forth in the claims with possible exception to apparatus creates pleasant crackling sounds.



**Fig 2**



**Fig 3**

**US006017373 (Frisch)** teaches, from applicant's same combustible flame producing field of endeavor, snapping and popping of burning wood arises from heating of moisture and sap which naturally exist in the log. **US006017373 (Frisch)** also teaches that it is known and

desirable duplicate the sound of burning natural logs in artificial burning flame producing article or apparatus, for the purpose of providing an ascetically pleasing sound from the artificial article.

**US006017373 (Frisch)** teaches the following:

(7) Typical prior art artificial logs burn much more quietly than natural logs and do not duplicate the roar of burning natural logs. Also, as discussed below, **natural logs exhibit loud snapping and popping, the snapping and popping arising from heating of moisture and sap which naturally exist in the log.**  
(Highlighting and Underlining Added)

**Donnelly** teaches from applicant's same the wood fire field of endeavor, that it is well known to select a given type of wood for the purpose of intentionally creating a "crackling fire" (see page 18, line 5) when burned, according to the preference of the person to, for example, create a "cheerful atmosphere, to attract friends for a cozy evening" (page 17, last line).

**Donnelly** also teaches that "Almost any wood will pop and throw sparks" due to rupturing of wood cells resulting from "water in the wood being changed to steam as the wood is heated" and "from pitch, resin, and oils contained in the wood" (page 34, line 3- page 35, line 3). **Donnelly** further discloses and teaches that the degree that a given wood species produces "sparks", necessarily accompanied by a "loud pop" as wood cells rupture, is known (page 85, last full paragraph). In this regard **Donnelly** provides a "Table of Firewood" wherein "The different burning characteristics of each wood are listed so you should make your selection according to the type of fire you desire: ease of starting, high heat, fragrance, sparks, smoke, coaling qualities, etc." (pages 88-95).

In regard to claims **158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219 and 264**, for at least the purpose of duplicating the ascetically pleasing audible snapping or popping sound of a natural wood fire, to create a "cheerful atmosphere", it would have been obvious to a person having ordinary skill in the art to form the wood wick material of **SE9903818 (Ebeling)** from a wood product known to produce a desired level of audible crackling, snapping or popping sounds such as due to a desired level of moisture therein (e.g. – from water, pitch, resin, oils, etc.), in view of the teaching of **US006017373 (Frisch)** and **Donnelly**.

In regard to claims such as **158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219** and **264**, since the wood specie (e.g. – Cherry , poplar, fruit wood, hardwood), relative dimensions of the wick and fuel body, the wick size, number and shape of the wick(s), would necessarily depend on numerous interrelated design concerns such as a rate of burn, desired level or volume of audible sound or noise, a desired amount of light to be produced, particular fuel characteristics, the size and shape of a given candle article, etc. to form the wooden wick of the **SE9903818 (Ebeling)** candle in the manner set forth in the claims can be viewed as nothing more than merely a matter of choice in design absent the showing of any new or unexpected results produced therefrom over the prior art of record.

In regard to claims **171, 179, 201, 255** and **264**, for example, wood grain is known to be generally straight (**See US000383822 (Munger)**).

In regard to claims **167, 170, 189, 209** and **210**, for example, Official Notice is taken that it is well known to form burner wicks from a wood product of pressed wood particle/powder product or a high density fiberboard material (see **US0059839** and **Ladd (US00197902)** and adhesive in the pressed wood and wherein the adhesive is an added resin, gum, or natural glue (see **US00431033**). As such, in view of that which is well known and for the known purpose, it would have been obvious to a person having ordinary skill in the art to form the candle in the manner set forth in the claims.

In regard to claims such as **165, 185, and 205**, for example, Official Notice is taken that it is well known to provide candle fuel, and therefore the embedded wick, with scented oil for the purpose of producing a desired fragrance (see **Fredricks (3,175,876)**). Furthermore, Official notice is taken that all woods include naturally occurring dyes producing a characteristic color of the wood, and oils which when burned necessarily produce a fragrance.

In regard to claims **176, 196, 217** and **238**, for example, the wood wick of **SE9903818 (Ebeling)** will necessarily be sealed or coated with wax, as it is located with a solidified body of wax type fuel.

In regard to claims such as **178, 198** and **219**, for example, since bleaching, dyeing and apply printed images to the wick do not affect the operational characteristic of the wick and

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amount to nothing more than merely an ascetic effect, these limitation can be given no patentable weight..

In regard to claims such as, **158-160, 162-165, 167-168, 170-171, 173-180, 182-185, 187, 189-190, 193-202, 204-205, 209-211, 214-219** and **264**, since the selection of the wood would necessarily depend on numerous design concerns such as a desired rate of burn, the desired amount or volume of audible noise (e.g. - crackling, snapping and popping) of the burning wood, etc., to select any one of Prunes Serotina, Hardwood, Softwood, Cherry, Poplar, Maple, Birch, Beech, Basswood, Aspen, Yellow, Buckeye, Oak, cellulose and lignin, Cedar, Spruce, Cypress, Pine, Pacific Yew, Silverbell, Witch Hazel, Tropical Wood, Rimo, Pillarwood, Wenge, Rosewood or Bamboo, etc. can be viewed as nothing more than merely a matter of choice in design absent the showing of any new or unexpected results produced therefrom over the prior art of record.

In regard to claims such as **160, 162, 164, 180, 182, 200** and **202**, for example, Official Notice is taken that it is known to make candle from meltable fuel(s) including petroleum (paraffin), mineral (montan), synthetic wax, clear candle waxes, or "gels", beeswax, carnauba, candelillia or vegetable-based wax, including stearic acids, UV inhibitors, polyethylene, scent oils, or color pigments, a vegetable-based wax including palm and soy, cotton, olive, linseed, castor, peanut and jojoba. As such in view of that which is well known and for the known purpose it would have been obvious to a person having ordinary skill in the art to form the candle in the manner set forth in the claims.

#### **Allowable Subject Matter**

Claim **241-262** allowed.

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#### **Conclusion**

See the attached USPTO for, 892 for prior art made of record and not relied upon which is considered pertinent to applicant's disclosure.



**USPTO CUSTOMER CONTACT INFORMATION**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carl D. Price whose telephone number is (571) 272-4880. The examiner can normally be reached on Monday through Friday between 9:00am-5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Steven B. McAllister can be reached on (571) 272-6785. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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/CARL D. PRICE/

Primary Examiner, Art Unit 3749